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if out of office, the limit of punishment is disqualification for the future. The Blount and the Belknap cases exhaust the arguments, pro and con.

Then follows a brief discussion of the Rules of Evidence relating to impeachments and the Competency of Witnesses. In practice, it appears that the Senate has invariably received all the evidence which it deemed relevant, from any witness who had personal knowledge of the facts, no matter by whom it was to be proved, and left its weight to be determined upon final consideration.

The Sixth Amendment to the effect that one accused shall enjoy the right of trial by jury has never been held to be applicable to impeachments. While in one sense an impeachment is a criminal prosecution, yet since Blount's case (A. D. 1797), no one has seriously contended that the Senate was compelled to send an issue of fact to a jury for determination.

After pointing out the difficulty of securing the constant attendance upon the trial of the actual presence of a quorum of Senators, Mr. Simpson makes certain suggestions as to methods of obtaining evidence, and as to changes in procedure which he embodies in a Table of 50 Rules, printed in the final part of the Appendix. These ought at some time to receive careful consideration by the Senate. They are entitled to thorough attention, because the fruit of experience on the part of one who during a long and unusually active and varied career at the bar has been frequently called on to draft statutes and rules of court in aid of procedural reform. Mr. Simpson brings no "prentice hand" to his work.

In summing up, the author impressively remarks that of the nine cases of Federal Impeachment, one was of a President, one of a Senator, one of a cabinet officer, and six were of judges, and hence, forecasting the future from the past, impeachment as a practical remedy will apply mainly to judges. The necessity for some Act defining "good behavior," and regulating control of the judiciary by a competent and efficient tribunal, while avoiding anything which would undermine the independence of the bench, is thoughtfully stated.

The book has been written by a strong man with a strong hand.

Hampton L. Carson.

STANDARDS OF AMERICAN LEGISLATION. By Ernst Freund. Pp. xx, 327. Chicago: University of Chicago Press, 1917.

"The legal science of legislation means the knowledge of how to translate a given policy into the terms of a statute." That this is no easy task, our recent history reveals: for instance, our present revenue law. If, in this connection, we recall the dominant position of lawyers in our legislatures and drafting rooms, it is clear that a book on this topic should fill a real need.

The author's plan is simple. He begins by sketching recent developments in the field of social interests and standards and the accompanying

attitude of the courts. Then he traces public policy to its roots in common law. He then considers the degree of success attained by our laws under the suggestive title, *The Tasks and Hazards of Legislation*. The effect of constitutional provisions is considered, followed by a discussion of Judicial Doctrines. Then he treats of *The Meaning of Principle in Legislation*. In the last chapter he deals with *Constructive Factors*.

The last decade produced great changes in the attitude of the courts toward social legislation. The opposition reached its maximum in the *Bakeshop* case in New York in 1905, and the *Ives* case of 1911 (the amendment of the workmen's compensation law) in which latter the court intimated that such policies must come from the people by constitutional amendment. This case was, in large measure, responsible for the demand for the recall of judicial decisions. In other words the people object to having any policy fixed upon the State by judicial interpretation of constitutional provisions. The most serious objection is that policies thus fixed are indefinite. For instance, take the emphasis placed by the courts on Freedom of Contract. The courts have not made clear its boundaries, and have only suggested that "reasonableness" is the criterion. "To oppose legislative discretion by undefined judicial standards of reasonableness is to oppose legislation by judicial discretion, and constitutional doctrines so vaguely formulated cannot be expected to command confidence."

The author emphasizes the significance of the historical development which has so nearly equalized the legal rights of persons. The American law inherited the principle of equality from the English, and has found its chief difficulty in the presence of the negro. Indications of this process are: 1. The Right of Personality. (a) Slavery has gone; (b) legal class distinctions have disappeared; (c) legal rights of aliens are recognized. In spite of the fourteenth amendment land law is still under state control; (d) emancipation from domestic subjection.

2. Freedom of Thought. Until the middle of the seventeenth century, it was taken for granted that the safety of the state demanded the control of opinion. Of our colonies, only Rhode Island proclaimed the principle of toleration. As a matter of course, the state controlled printing. At first, nothing could be printed without previous license. This provision was removed in 1694, and the result was "Freedom of the Press." As regards sedition and libel laws, there has been a "complete reversal of older policies." "That immediate political advantage is so readily sacrificed to the conviction that free expression of political opinion is in the long run more wholesome to the constitution of the body politic is one of the most remarkable achievements of democracy and of education in public affairs." In this field the change has been in the removal of old restraints; the positive function of legislation has been small.

3. Repression of Unthrift and Dissipation. Gambling, drink and vice are viewed through new eyes. In older Europe, public morality was largely left to the church, as in England, where the church controlled marriage as well as incest. There is also marked development in the field of public health and safety. Sanitary laws are real laws—a new legislative *function*—in advance of public sentiment, yet educative.

As a result of these changes, the emphasis in the state has shifted from *security* to *welfare*.

The term *social legislation* arose in Germany in connection with workmen's insurance. In this connection it is significant that the stigma has dropped out of relief. It is no longer alms, but a right, dovetailed with industry. Pensions become rights. In America we are mainly on the old basis, though in the case of children we have really shifted to the new, both in factory laws and education. In America the control of hours of women's labor has been the chief battleground of conflicting constitutional theories. The old defense on basis of police power is becoming untenable.

The attitude of the courts towards changes which threatened the overthrow of old principles—and whose further development was very uncertain, can be understood. The attempt by the courts to check social legislation "can be properly estimated only if we recognize in it the exercise of a political, and not a strictly judicial function."

Our law has a dual source in the old unwritten common law and in the royal prerogative which underlies equity and which enters into property relations only. "It is hardly possible to overestimate the theory that corporate existence depends on positive sanction as a factor in public and legislative policy." Common law is "a system of justice rather than policy, and its policy is not always easy to discover." Freund thinks that class bias has played far less part in law than is generally assumed.

Changed conditions of industry have caused a gradual modification of the concept of freedom of contract. In Prussia soon after the introduction of railroads, liability regardless of negligence was imposed. In the United States this was extended to passengers only and our law of negligence is very unsatisfactory. Common law has failed to keep pace with changing ideals. Our system of rights and obligations is too abstract and undifferentiated. Protection is not secured in matters of social concern. The spirit of common law is too neutral for effective offensive against injuries to the weaker members of society.

Welfare legislation has sought to define more thoroughly and to strike bad conditions at their source; to make effective changed concepts of right and wrong. The attempt has not always been successful. It has failed to correct combinations in restraint of trade. It has not brought about high standards in trade.

New conditions have been faced in dealing with gambling. The attempt to outlaw legitimate business, like the stock exchange, because in certain aspects it promoted gambling, has failed. Much trouble has been caused by legislation discriminating against such products as oleomargarine, and by court decisions thereon. "The courts tell us that valuable interests may be sacrificed to conjectural reasons, but the practical needs of the community reject and finally overthrow the conclusion."

It has sometimes happened that desirable ends could be reached by indirection only, *i. e.*, by the use of the taxing power to suppress some

dangerous trade, such as the white phosphorus match industry. However, legislative policies must not sail under false colors.

There is always a danger in the survival of old standards under new conditions. In Massachusetts all amusement licenses may be revoked at the will of local authorities, "so that valuable and perfectly legitimate interests are subjected to an arbitrary and unregulated power, totally at variance with the spirit of our institutions or even with the idea of government by law."

The contents of our state constitutions have been grossly neglected by students. There is in them an excess of detail. There is much emphasis on forms of organization, but little on efficiency of administration. This always causes trouble when unforeseen changes come. It is significant that everywhere the public is dissatisfied with the machinery of democracy. As a result there is a marked tendency toward direct legislation. Many of the suggested changes are good—others useless. For illustration, the provision that all bills must be read three times defeats itself, for the legislature will find some way to avoid the rereading of long bills. In fact, "guarantees of right and justice are not the deliberate creation of a constitution-making democracy, nor its chief or even serious concern." The emphasis should be on principles, not on details.

The theory of constitutional supremacy is an outgrowth of American conditions. The courts gradually asserted the right to control the abuse of legislature, but not until 1857 were there decisions declaring laws unconstitutional as being in violation of vested rights. Gradually business of public interest is declared subject to regulation. We pass then from an era of economic individualism to one of control. Much of the new legislation was defective. The public demanded a judicial check and this was forthcoming. Though the attitude of the courts is open to debate, the author does not believe they will seriously block desired changes, and he suggests that "perhaps a somewhat more constructive influence might be exercised by the courts upon legislation."

In many of the much disputed questions no settled principles can be used. Legislation must be determined by policy, and many experiments will be necessary. "The bulk of constitutional provisions crystallize historic or modern policies and not permanent principles." As it now stands, "due process of law" is "the main, if not the sole, guarantee of principle in legislation." "Against judicial opinions which fail to state clear issues, which are hesitating in their expressions, and which are qualified in subsequent cases, we set the striking consensus of widely separated jurisdictions in abandoning policies which were imprudently adopted and which experience proved to be intolerable, and we cannot doubt on which side we should find the true principle of legislation." Our laws are often so vague and lacking in correlation that they constitute a serious problem in jurisprudence. Attention should be paid to this question of correlation. This point is emphasized by a survey of the Abilene case; the Pipe Line cases; Illinois Warehouse legislation, etc. This lack of correlation is very evident in labor legislation, and accounts for some of the questionable pronouncements by the courts.

There must come then greater standardization. "The principle of standardization has four main applications or phases in the making of statute law: conformity to undisputed scientific data and conclusions: the working out of juristic principles, the observance of an intelligible method in making determinations, and the avoidance of excessive or purposeless instability of policy."

The author seeks to prove that there exist "principles of legislation apart from recognized doctrines of constitutional law."

The construction of law by the courts is "essentially supplemental legislation." Such construction is necessary and desirable, and "there has been on the whole a very well defined judicial attitude towards questions of construction." Faulty as our court decisions may have been at times, "the courts represent our best in government while our legislatures do not."

European legislation is superior to ours, largely, the author believes, because "under every system, except the American, the executive government has a practical monopoly of the legislative initiative." We would do well to modify our practices. We are making some attempts by "(1) the preparation of bills by special commissions; (2) the delegation of power to administrative commissions; (3) the organization of drafting bureaus, and (4) the codification of standing clauses."

Some of our trouble comes from the fact that the teaching of law is on the case method which is professionally advantageous but socially disastrous. The problems to be met by law are social, and the teaching should be modified. The determination of policies is a political matter. It will be advantageous to the people as well as to the government when the drawing of legislation receives more attention.

In this cursory and unsatisfactory fashion I have sought to sketch the contents of the book. Professor Freund is exceedingly careful and eminently fair. Though he has criticized the courts at times, he has sought to understand their attitude, and all his criticism is based on specific cases. In each topic treated there is constant citation of cases. Personally I am greatly indebted to the author for some of his suggestions, and I shall have opportunity to discuss his ideas in the classroom. The reviewer is not a lawyer, but for many years he has been in close contact with problems of legislation, and has ever tried his hand at drafting laws. He feels qualified (in a measure) to judge the author's work. It will be read with profit by lawyers and I hope by many legislators who are not lawyers. The latter will not find the reading easy—it will be profitable.

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ROMAN LAW IN THE MODERN WORLD. By Charles Phineas Sherman. 3 vols. Boston; The Boston Book Co., 1917.

The three well-printed and well-bound volumes in which Professor Sherman has presented his work raise expectations that are not satisfied.